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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 18, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Stop Code 1170
Washington, D.C. 20554

Re: MM Docket No. 92-259, MM Docket No. 90-4 and
MM Docket No. 92-295/RM-8016

Dear Ms. Searcy:

Enclosed herewith on behalf of Cypress Broadcasting, Inc. are
an original and eleven copies of its Reply of Cypress Broadcasting

JUN 18 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the Cable Television
Consumer Protection and Competition
Act of 1992

MM Docket No. 92-259

Broadcast Signal Carriage Issues
Reexamination of the Effective
Competition Standard for the
Regulation of Cable Television
Basic Service Rates

MM Docket No. 90-4

Request by TV 14, Inc. to Amend
Section 76.51 of the Commission's
Rules to Include Rome, Georgia, in
the Atlanta, Georgia, Television Market
Georgia, Television Market

MM Docket No. 92-295
RM-8016

To: The Commission

**REPLY OF CYPRESS BROADCASTING, INC. TO OPPOSITION OF
GRANITE BROADCASTING CORPORATION TO PETITION FOR RECONSIDERATION**

Cypress Broadcasting, Inc. ("Cypress"), by its counsel and pursuant to Section 1.429 of the Commission's Rules, replies to Granite Broadcasting Corporation's ("Granite") Opposition To Petition for Reconsideration, stating as follows:

1. Cypress' Petition for Reconsideration requested that the Commission reconsider and reverse its decision implementing the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") in this proceeding, to the extent that the Commission accorded must-carry rights to a television station in the station's home county when that station is assigned to an ADI which does not include the home county (the "home county exception"). This Reply responds to the issues raised in Granite's Opposition to Cypress' Petition.

II. The Decision to Create the Home County Exception Is Contrary to the Express Language of the Cable Act

2. Cypress' Petition demonstrated that the Commission's creation of the home county exception is contrary to the express language of the Cable Act. Cypress demonstrated that Cable Act Sections 614(a), 614(h)(1)(A), and 614(h)(1)(C)(i) (47 U.S.C. §§ 614(a), 614(h)(1)(A) and 614(h)(1)(C)(i)), when read together, require the Commission to determine a station's market for must-carry purposes in the manner provided in Section 73.3555(e)(3)(i) of the Commission's Rules.¹ Section 73.3555(e)(3)(i) of the Commission's Rules requires that a station's market be its Arbitron ADI.

3. Granite claims that the Commission's home county exception is consistent with the Cable Act. In doing so, Granite ignores the express language of the Cable Act, as well as past Commission practice which gives context to the Cable Act.

4. Granite attempts to leave the false impression that the Cable Act expressly provides authority for the Commission to adopt the home county exception by claiming that:

[u]nder these provisions [the mandatory broadcast signal provisions of the Cable Act], every full power station is accorded must-carry rights on cable systems within the same market, with a station's market being defined as the ADI to which it is assigned by Arbitron and its home county, even if that county belongs to a different ADI.

Granite Opposition at 2-3 (citing (in note 3) "Cable Act, § 614(h)(1)(C); Report and Order, ¶ 39"). As noted above, the Cable Act, by incorporating Section 73.3555(e)(3)(i) of the Commission's Rules, clearly requires the Commission to define a station's market

¹ Section 614(h)(1)(C)(i) refers to Section 73.3555(d)(3)(i), which the Commission correctly notes in its Report and Order has been renumbered as Section 73.3555(e)(3)(i)

as its Arbitron ADI, with no provision for ad hoc expansion of a market where the home county of a station lies outside of its ADI. Thus, there is no statutory authority for the Commission to ignore the Cable Act requirement that the market of a station for must-carry purposes is to be established using Arbitron ADI's as set

home county exception is a "general rule" therefore has no factual basis. Moreover, the Commission may not adopt a "general rule" if that rule is contrary to the Cable Act.

8. The Commission's adoption of the home county exception therefore is not consistent with the provisions of the Cable Act and should be reconsidered and reversed.

III. The Commission's Adoption of the Home County Exception Fails To Meet The Cable Act's Evidentiary Requirements

9. Cypress' Petition argued that the Cable Act creates a specific process which must be followed (and which was not followed) where a station seeks treatment as a must-carry in communities outside of its market. In particular, the Cable Act requires that, for each community in which a station seeks to be treated as a must-carry, the station must demonstrate the propriety of changing the station's must-carry market, paying particular attention to the value of localism. The Cable Act (at Section 614(h)(1)(C)(ii)) directs the Commission to afford:

particular attention to the value of localism by taking into account such factors as --

a. whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

b. whether the television station provides coverage or other local service to such community;

c. whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;

d. evidence of viewing patterns in cable and noncable households within the areas served by the cable system or

systems in such community.

Cable Act Section 614(h)(1)(C)(ii).

10. Cypress' Petition demonstrated that Granite's Comments failed to provide adequate information on the four factors set forth in Cable Act Section 614(h)(1)(C)(ii). Granite claims that these factors are mere "examples" of the kinds of issues the Commission is directed to consider, Granite Opposition at 9, and that its Comments set forth enough information to meet the evidentiary showing required by Cable Act Section 614(h)(1)(C)(ii). Granite Opposition at 10, n. 10.

11. Granite's argument ignores the fact that the Commission's Report and Order establishes that any request for modification of a station's ADI must be made in compliance with Section 76.7 of the Commission's Rules, as modified in the Report and Order, for special relief filings. Granite's Comments were not made in compliance with these rules for special relief filings. This failure to comply with applicable procedural requirements requires the Commission to reconsider and reverse its home county exception ruling.

12. Granite's argument also ignores the fact that its Comments contained information applicable to all of Santa Clara County, and not to individual communities in Santa Clara County. Cable Act Section 614(h)(1)(C)(i) requires that any request for a modification of a station's ADI must be considered on a community-by-community basis and that "community" is not synonymous with "county." Thus, Granite's information submission and the Commission's home county exception are defective because they purport to

deal with Santa Clara County as a whole, while the Cable Act requires that a station's request for modification of its must-carry market be handled on a community-by-community basis.

13. Finally, Granite's Opposition ignores the Commission's statement in its Report and Order on the evidence it expects to be provided along with a request for a modification of a station's must-carry market. The Commission stated that, while it was not restricting the kinds of information a station could submit with a request, "[a]s guidance to petitioners, however, we likely would find the following information to be helpful." Report and Order at ¶ 47. The Commission then repeated the four factors set forth in Cable Act Section 614(h)(1)(C)(ii). Id. Therefore, Granite cannot claim that the four factors set forth in Cable Act Section 614(h)(1)(C)(ii) are mere suggestions for how to address the issue of localism which a station can freely ignore.

14. Granite has failed to meet both the evidentiary and procedural requirements of the Cable Act for a modification of a station's must-carry market. Therefore, the Commission must reconsider and reverse its home county exception decision.

IV. The Commission Deprived Cypress Of Its Due Process Rights When It Adopted The Home County Exception

15. In its Petition, Cypress demonstrated that, in adopting the home county exception, the Commission deprived Cypress of its due process rights because the Commission gave no notice that it might adopt a home county exception.

16. Granite's Opposition concedes that the Administrative Procedure Act, 5 U.S.C. § 553(b)(3), requires a notice of proposed

rulemaking to include "...either the terms and substance of a proposed rule or a description of the subjects and issues involved." Granite admits that the U. S. Court of Appeals for the District of Columbia Circuit has held that this notice requirement is only satisfied if the content of the agency's final rule is a "logical outgrowth" of its rulemaking proposal, i.e., the parties "should have anticipated that such a requirement might be imposed." Aeronautical Radio, Inc. v. FCC, 998 F.2d 428, 445-46 (D.C. Cir. 1991) (citing Small Refiner Lead Phase-Down Task Force v. E.P.A., 705 F.2d 506, 549 (D.C. Cir. 1983)).

17. Granite claims that, since the Commission in its Notice of Proposed Rulemaking indicated (NPRM at ¶ 18) that: (a) it could make modifications it deems necessary to station's markets which the Cable Act requires to be defined in the manner provided in Section 73.3555(e)(3)(i) of the Commission's Rules, (b) "[e]ach county in the contiguous United States is assigned exclusively to one ADI," (c) "[s]ome ADIs are as small as one county[,] and others include many counties...." and (d) the Commission was seeking comments on how it should make adjustments to the basic ADI-defined market in a number of situations not addressed by the Cable Act, the Commission gave notice that it might adopt a home county exception. Granite Opposition at 15. Granite argues that, since it had proposed the home county exception in its Comments (which it failed to serve on Cypress), Cypress had a chance to oppose the proposal and "there was no need for Granite to oppose it." Granite Opposition at 16.

been clairvoyant to have anticipated that the Commission would adopt a home county exception based solely on a reading of the NPRM. The NPRM, by making general observations about the way in which ADIs are constructed and indicating that the Commission might alter ADIs, did not even hint that the Commission might adopt a home county exception which was inconsistent with the express wording of the Cable Act. Indeed, in the NPRM, the Commission indicated exactly the opposite. The NPRM acknowledged that, "[t]o better reflect market realities and effectuate the purposes of this Act, Section 614(h)(1)(c) permits the Commission to add communities to or subtract communities from a station's television market following a written request." NPRM at ¶ 19 (emphasis added). Thus, in the NPRM, the Commission clearly acknowledged that it could only add "communities" to a station's television market and that it could do so only after a written request in accordance with procedures to be adopted in the NPRM. Id. at ¶ 19, n.21.

19. The NPRM simply failed to give any notice that the home county exception might result from the rulemaking proceeding. The only specific references to changes in ADIs to which the Commission referred were the following questions:

To some extent ADIs change from year to year. How should we accommodate these sporadic changes? Moreover, Arbitron only creates ADIs for counties located in the continental U. S. What should be the market for other areas? In addition, how do we accommodate technically integrated cable systems that serve communities located in more than one county where such counties are assigned to different ADIs by Arbitron?

possible changes, the addition of communities to a station's ADI was addressed in Cable Act Section 614(h)(1)(c). The NPRM gave no notice that the Commission might adopt a rule inconsistent with this provision of the Cable Act. As a result, not only was there no express or implied notice that a home county exemption might be adopted by the Commission, there was nothing in the NPRM that gave any basis for Cypress to anticipate that the Commission might adopt such a home county exception. The absurdity of Granite's position is highlighted by its argument that, even though Granite failed to serve its Comments on Cypress, Cypress should be deemed to have been put on notice that Granite had made a home county exception proposal and that Cypress also should be deemed to have chosen not to argue against the Granite proposal.

20. Because the NPRM failed to provide adequate notice to Cypress that the Commission might adopt a home county exception that could have an adverse impact on Cypress the Commission should reconsider and reverse its adoption of the home county exception.

V. The Commission's Adoption Of The Home County Exception Is Contrary To The Public Interest

21. In its Petition, Cypress showed that, in addition to being contrary to the Cable Act, the Commission's adoption of the home county exception creates an unfair advantage for KNTV: KNTV can buy syndicated programming at the lower Salinas-Monterey ADI prices, while being physically located in the San Francisco-Oakland-San Jose ADI and while now also being treated as a must-carry station in Santa Clara County pursuant to the home county exception.

22. Granite claims that its unfair competitive advantage is "irrelevant" because the home county exception is consistent with the Cable Act's emphasis on "localism." Therefore, Granite argues, the home county exception is not contrary to the public interest.

23. At the very least, there is a factual issue as to whether the home county exception will aggravate a situation where KNTV has the best of both worlds to the disadvantage of every other station in the Salinas-Monterey ADI. When this factual issue is considered with all the other factors which weigh in favor of reconsideration of the home county exception, the Commission, at the very least, should reconsider the home county exception. Once it is open to

CERTIFICATE OF SERVICE

I, Zilpha Owens, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke, do hereby certify that a copy of the foregoing "REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION" was served this 18th day of June, 1993, by first-class postage mail

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